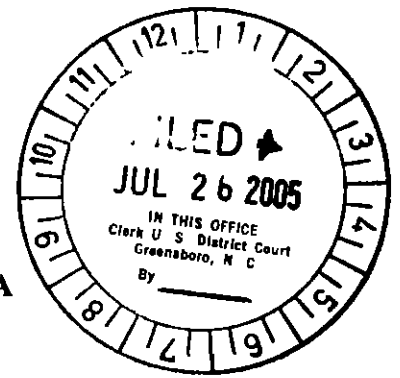


IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



Thomas Jefferson Price III,

Petitioner,

v

United States of America,

Respondent

1:05 CV 00666

198CR104-1

**RECOMMENDATION AND ORDER
OF MAGISTRATE JUDGE ELIASON**

Petitioner, a federal prisoner, has submitted a "motion to modify sentence pursuant to 18 U S C § 3582." In the motion, petitioner is attacking his conviction or sentence rather than seeking to have his sentence reduced due to a lowering of his sentencing range by the Sentencing Commission as required by section 3582(c)(2). The motion therefore must be construed as a motion to vacate sentence under 28 U S C § 2255. See United States v Winestock, 340 F 3d 200 (4th Cir 2003) (Rule 60(b) motion). As such, petitioner's pleading is defective because he has failed to file his claims on the proper Section 2255 forms. See Rules Governing Section 2255 Proceedings Rule 2(b)

There is no need to put petitioner through the extra work of submitting his claims on the proper forms, however, because Court records reveal that petitioner has already challenged this conviction in a previous Section 2255 action [1:01CV61]. Therefore, the present pleading should be dismissed for lack of jurisdiction because of petitioner's failure to obtain permission from the Fourth Circuit for a second or successive Section 2255 action, as is required by 28 U S C § 2244 and 28 U S C § 2255. See Winestock, 340 F 3d at 200. The Court notes that the Fourth Circuit denied petitioner permission to file a second section 2255 motion in December 2003 (Docket no 239).

IT IS THEREFORE ORDERED that the clerk send petitioner a copy of this recommendation, instruction forms for filing Section 2255 actions in this Court and Motions

for Authorization in the court of appeals, and four copies of Section 2255 forms (more copies will be sent on request) Petitioner should keep the original and two copies of the completed Section 2255 forms which can be submitted in this court if petitioner obtains approval from the Fourth Circuit

IT IS THEREFORE RECOMMENDED that petitioner's "motion to modify sentence" be construed as an attempt by petitioner to file a second or successive Section 2255 action

IT IS FURTHER RECOMMENDED that this action be dismissed due to petitioner's failure to obtain certification from the Fourth Circuit as required by 28 U.S.C. §§ 2244 and 2255 and Fourth Circuit Local Rule 22(d)


United States Magistrate Judge

July 26, 2005